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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 828

HARRY SACHER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit which affirmed a judgment of the United States District Court for the District of Columbia convicting the petitioner of violating Title 2, United States Code, Section 192.

Opinions Below

The opinions of the trial court denying petitioner's pretrial motions and holding him in contempt are reported at 139 F. Supp. 853, 855 and appear in the record at R. 64-74, 75-80. The opinion of the court below which first affirmed petitioner's conviction, is reported at 240 F. 2d 46. The opinion of the court below on remand is as yet unreported and is attached hereto as Appendix B.

Jurisdiction

The judgment of the Court of Appeals was entered on January 31, 1958 (Appendix A, *infra*). The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254(1).

Questions Presented

Petitioner, a lawyer, was subpoenaed to appear at an investigation of the Subcommittee on Internal Security of the Senate Judiciary Committee, conducted pursuant to Senate Resolution 366, *infra*. The matter under investigation was the recantation of Harvey Matusow, a former witness before the subcommittee, and the circumstances leading to it. The chairman of the subcommittee had announced that the subcommittee would not be sidetracked into any other matter. At the hearing, conducted by two members of the subcommittee, petitioner, who then represented clients in a pending motion for a new trial based upon an affidavit by Matusow, after protesting that the interrogation dealt with a matter then *sub judice* and invaded freedom of advocacy, answered all questions put to him about his relationship to Matusow. He was thereafter asked whether he had ever served a prison sentence. When he specifically challenged the pertinence of this question, the chairman of the subcommittee likewise expressed doubts about its pertinence to the announced subject under inquiry. The subcommittee counsel, Mr. Sourwine, then explained that the question was pertinent to the subcommittee's consideration of a measure barring Communists from practice in the Federal courts. In order to link the question about the prison sentence to this new subject-matter of qualifications to practice, Mr. Sourwine was directed to "lay a foundation" by first asking the witness concerning his present or past Communist Party affiliations. All of the remaining questions, of which the witness

declined to answer the three here in issue, were confined to this area of Communism, petitioner's personal background and private life. The questions on their face related exclusively to the subject of qualifications of practice and not to the recantation of Matusow. Nor was petitioner enlightened as to their relationship, if any, to the latter subject.

The questions raised by petitioner are:

1. Whether, in view of the language of the Resolution, the subcommittee's departure from the announced subject under inquiry, and the other circumstances of the case, the pertinence of the questions which petitioner declined to answer to the matter of Matusow's recantation "was made to appear with undisputable clarity" within the meaning of *Watkins* v. *United States*, 354 U. S. 178, 214-215.

2. Whether the subcommittee had legislative jurisdiction to interrogate petitioner about matters designed to injure and expose him rather than to aid in the achievement of a legislative purpose.

3. Whether testimony to establish the nature of the question under inquiry was properly admitted and considered at petitioner's trial under the contempt statute, when such testimony was at variance with the scope of the question under inquiry as communicated to petitioner at the hearing.

4. Whether the Resolution creating the Subcommittee on Internal Security of the Senate Judiciary Committee is unconstitutional on its face, or as applied through the questions put to petitioner in that

(a) it exceeds the investigative or legislative power of Congress;

(b) it is too vague and indefinite;

(c) it abridges rights secured to petitioner by the First Amendment;

(d) it violates the principle of separation of powers; or

(e) it abridges the right to counsel.

5. Whether the subcommittee was authorized by the Committee on Internal Security to conduct the investigation which is involved in this case.

6. Whether an indictment under 2 U. S. C. 192 is insufficient because it fails to allege or specify

(a) that the refusal to answer questions was deliberate or intentional;

(b) that the matter under inquiry was within the committee's or subcommittee's delegated authority; or

(c) the nature of the question under inquiry to which the *ad hoc* questions are alleged to be pertinent.

7. The grand jurors who concurred in finding the indictment included eleven government employees and two housewives who might have been wives of government employees. The question presented is whether petitioner made a sufficient showing of bias on the part of these grand jurors to entitle him to a hearing on the issue.

Statute and Resolutions Involved

R.S. 102, as amended by c. 594, Act of June 22, 1938, 52 Stat. 942, 2 U. S. C. 192 provides:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 or less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

Senate Resolution 366, 81st Cong., 2d Sess., established the Subcommittee on Internal Security of the Committee on the Judiciary of the United States Senate and authorized that subcommittee to make a "study and investigation" of the following:

> "(1) The administration, operation and enforcement of the Internal Security Act of 1950;
>
> (2) The administration, operation and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and
>
> (3) The extent, nature and effects of subversive activities in the United States; its territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign

government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence.'"*

Section 2 of the Resolution provides as follows:

"A majority of the members of the committee, or duly authorized subcommittee thereof, shall constitute a quorum for the transaction of business, except that a lesser number, to be fixed by the committee, or by such subcommittee, shall constitute a quorum for the purpose of administering oaths and taking sworn testimony."

Senate Resolution 180, 81st Cong., 2d Sess. amended subsection (3) of Rule XXV of the Standing Rules of the Senate, to read as follows:

"3(a) Except as provided in paragraph (b) of this subsection, each standing committee, and each subcommittee of any such committee, is authorized to fix the number of its members (but not less than one third of its entire membership) who shall constitute a quorum thereof for the transaction of such business as may be considered by said committee subject to the provisions of Section 133(d) of the Legislative Reorganization Act of 1946.

(b) Each standing committee, and each subcommittee of any such committee, is authorized to fix a lesser number than one third of its entire membership who shall constitute a quorum thereof for the purpose of taking sworn testimony."

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* Also invoked by the indictment is Senate Resolution 58 (84th Cong., 1st Sess.) which repeats the language of Senate Resolution 366.

The new matter introduced by Resolution 180 is subparagraph (b).

Statement of the Case

1. The proceedings before the Subcommittee on Internal Security.

Petitioner, a practicing attorney for more than thirty years (R. 56), was subpoenaed on April 19, 1955, to appear before the Subcommittee on Internal Security of the Senate Judiciary Committee (hereinafter called the subcommittee) which, since February 21, 1955, had been conducting an investigation in connection with the recantation of the testimony of one Harvey Matusow. At the time of his appearance, petitioner was counsel for a group of defendants who had moved for a new trial after having been convicted in the United States District Court for the Southern District of New York for violation of the Smith Act. *United States* v. *Flynn*, 216 F. 2d 354, cert. denied 348 U. S. 909.

This motion for a new trial, based upon an affidavit of the witness Matusow recanting his original testimony in the case, had been filed for the defendants by their attorney of record, petitioner appearing as their counsel only after the motion had already been filed (R. 50). At the time of his appearance before the subcommittee, the motion for a new trial was still pending before Judge DIMOCK in the Southern District of New York (R. 46).*

The matter under inquiry by the subcommittee was expressly set forth by Senator Eastland, the chairman of the

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* Shortly after petitioner's appearance before the subcommittee, Judge DIMOCK granted the motion and ordered a new trial for certain of the defendants represented by petitioner. *United States* v. *Flynn*, 130 F. Supp. 412.

subcommittee, at the beginning of the investigation on February 21, 1955. Senator Eastland then stated that the witness Matusow had previously appeared before the same subcommittee and had given sworn testimony on the subjects of the Institute of Pacific Relations, "certain youth organizations", and the International Union of Mine, Mill and Smelter Workers. The chairman further recited that "Mr. Matusow has since made public statements recently to the effect that he lied when he testified before this subcommittee and on other occasions. The purpose of the hearing now commencing is to inquire into this whole matter" (R. 100).

The chairman concluded his statement concerning the purpose of the hearing as follows (R. 103):

> "The subcommittee in this series of hearings hopes to determine what is the truth. The subcommittee may be able to show, in some instances, what are lies. The subcommittee probably can and will try to make a record as to just what Mr. Matusow now says the truth is. The subcommittee also will seek to determine, from the testimony of this witness and others, all of the facts surrounding this case, and to make as complete a record of these facts as possible.
>
> "The subcommittee does not propose to be sidetracked into any examination or consideration of matters not involved with the testimony of Harvey Matusow, his public utterances, and the preparations and publication of the book soon to be published under his name".

Thus, when petitioner appeared on April 19, the subcommittee had authoritatively announced the nature and limitations of its investigation. At the time of petitioner's testimony, no new announcement was made that the subject matter of the investigation as previously defined had

been enlarged or altered (R. 40).* Petitioner was first asked in what way he had been "associated with the defence of Communist cases" for the purpose of identifying him "as of counsel in certain prominent cases which have involved leaders of the Communist Party" (R. 41-42). When petitioner, as a lawyer, protested questions about his professional practice, he was told by the chairman that "any questions which may be asked you regarding anything associated with the subversive elements in this country, if there are such, is a pertinent question, and it is pertinent to this inquiry" (R. 43).** Petitioner thereupon again appealed to the chairman to refrain from exacting disclosures which might compromise freedom of advocacy (R. 44). Upon being further informed that these questions were merely preliminary, he withdrew his objection and answered the questions.

Petitioner was then interrogated about a document which he had received from Matusow and which had been offered in evidence in support of the motion for a new trial (R. 45-46). After fruitlessly pointing out to the subcommittee the impropriety of calling upon him, as counsel in the case, to discuss matters which were then *sub judice* (R. 45-46), petitioner answered all questions concerning his activities in connection with the motion for a new trial and his relationships with the witness Matusow. He testified that he first met Matusow in a purely professional capacity *after* Matusow's recanting affidavit had been filed

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* At petitioner's hearing on April 19, 1955, only two members of the nine-man subcommittee, namely, Senators McClellan and Jenner, were present (R. 39-40). The transcript of petitioner's testimony before the subcommittee was introduced into evidence at the trial and appears at R. 40-59.

** This appears to be a capsule paraphrase of clause 3 of the basic resolution defining the subcommittee's jurisdiction (*supra*).

and two days before Matusow took the witness stand on the motion for a new trial.

He further testified that he had no knowledge of or any connection with Matusow's recantation of other testimony or with a book written by Matusow in which he discussed generally his career as a false witness. Petitioner also stated that he had not participated in the preparation of the motion for a new trial itself or in securing Matusow's affidavit which was attached to the motion for new trial and that he had only come into the proceedings as trial counsel after the motion had been filed and the matter set for hearing (R. 44-50).

After the completion of petitioner's testimony concerning the matter upon which he had been summoned, *i.e.*, the recantation of Matusow, the following questions were put to him which served as the basis for the contempt conviction below. The questions and petitioner's responses are set out below as they appear in the official transcript of the hearing before the subcommittee (R. 50-57):

> Mr. Sourwine. Mr. Sacher, have you ever served a prison sentence?
>
> Mr. Sacher. Mr. Chairman, is that question related to some legislative purpose? I wonder.
>
> Senator McClellan. The Chair will hear counsel. I was not just certain what the purpose of it was.
>
> Mr. Sourwine. Mr. Chairman, among the measures under consideration by this committee is proposed legislation for the purpose of fixing additional standards with respect to the practice of law in the Federal courts. Among the suggestions for inclusion in such legislation is one which would prohibit members of the Communist Party from practicing in Federal courts. It is germane to the consideration of such legislation to inquire into the circumstances involving the prac-

tice of law in Federal court by persons who are Communists and by persons who are defending Communists. I believe that the inquiries made here and other inquiries which have been made and which will be made in this Matusow case have bearing upon that legislative problem now pending before the committee.

Mr. Sacher. I would like to be heard, Mr. Chairman, if I may.

Senator McClellan. The Chair thinks that you should lay a foundation for that first by asking the witness if he is a member of the Communist Party, if he has ever been, and so forth.

Mr. Sacher: Mr. Chairman, may I be heard, please?

Senator McClellan. Briefly.

Mr. Sacher. Mr. Chairman, my understanding, when I came here, was, as given to me by those who served the subpoena to me, that I was going to be interrogated concerning the Matusow recantation. I believe, and I say this with as much of a sense of responsibility as 30 years of practice at the bar have given me, that I have established rather conclusively by evidence other than Matusow's own recantation before Judge Dimock, that he lied and lied outrageously at the Flynn trial, and I should like the opportunity before I leave the stand today to file with your committee, Mr. Chairman, copies of the briefs that I filed with Judge Dimock and copies of some 13 exhibits that I prepared to demonstrate the falsity of Matusow's testimony at the Flynn trial.

The suggestion that my political beliefs or associations are to be inquired into seems to me to be diversionary in character. I maintain that Matusow lied and that, if this committee wants to know how our judicial procedures may be improved, let them wait until Judge Dimock passes judgment on everything that

transpired before him. Let there not be here made an attempt to prejudice the determination not only by Judge Dimock, but by the people of the United States as to whether or not Matusow lied when he testified at the Flynn trial. Now I submit, Mr. Chairman, that this—if I may say so—that this is doing a disservice to the administration of justice.

Senator McClellan. That is what we are trying to find out. Now let us proceed, Mr. Counsel, and ask the proper questions to lay the foundation for this.

Mr. Sourwine. Are you, Mr. Sacher, a member of the Communist Party, USA? [Count 1]

Mr. Sacher. Mr. Chairman, I have been called here because of my representation of the defendants in United States against Flynn on a motion for a new trial on the ground that Harvey Matusow committed perjury in their trial. I have answered and am prepared to answer all questions concerning my participation in that case. I refuse. I refuse categorically, Mr. Chairman, to discuss my beliefs, religious, political, economic, or social. I do not do so on the ground of the fifth amendment. I do so because it is inconsistent with the dignity of any man to be compelled to disclose his political, religious, economic, social, or any other views. And I respectfully submit that an inquiry to me concerning this matter is not pertinent to anything with which this committee is concerned, and is not relevant to any inquiry that may properly be made of me. And I therefore decline on the ground that I cannot with any regard for my own self-respect, do otherwise, Mr. Chairman.

Senator McClellan. Well, the Chair does not think that is is beneath the dignity of a good citizen of the United States to answer a question as to whether he is a member of an organization that seeks the overthrow of this Government by force and violence and

therefore, the Chair propounds to you now the question, Are you now a member of the Communist Party of the United States?

Mr. Sacher. Mr. Chairman, medieval inquisitors also thought there was no impropriety in asking those whom they regarded as heretics to answer the question.

Senator McClellan. The Chair does not care for a lecture. The Chair asked you a question.

Mr. Sacher. And I decline to answer that question, Mr. Chairman.

Senator McClellan. The Chair orders you to answer the question.

Mr. Sacher. I decline to answer that question on the grounds I have already stated.

Senator McClellan. The Chair asks you another question. Have you ever been a member of the Communist Party of the United States? [Count 2]

Mr. Sacher. I respectfully submit, Mr. Chairman, that my conscience dictates to me that I shall not, under your compulsion or anybody's else's compulsion, make any disclosure of any of my beliefs, political, religious, economic, or social, past or present, and I decline to answer your question.

Senator McClellan. The Chair orders you to answer the question.

Mr. Sacher. I respectfully decline to answer it.

Senator McClellan. The Chair asks you another question. Have you ever been a member of any organization, Communist Party or by any other name, that advocates and seeks the overthrow of the Government of the United States by force and violence?

Mr. Sacher. I will state to the Chair that I have never been a member of any organization which I believed to be a teacher or advocate of the forcible or

violent overthrow of the Government of the United States.

Senator McClellan. All right, you may proceed.

Mr. Sourwine. Have you ever served a prison sentence?

Mr. Sacher. I have, sir. I am sure that that will be most illuminating for the legislative purposes that the committee has in mind.

Mr. Sourwine. What was that sentence for?

Mr. Sacher. I was sentenced for contempt of court.

Mr. Sourwine. Have you ever been disbarred?

Mr. Sacher. No, sir.

Mr. Sourwine. Have you ever been ordered disbarred?

Mr. Sacher. An order was made but was reversed by the Supreme Court of the United States. You see, Mr. Chairman, counsel is not interested in eliciting the truth. He is interested in smearing me, and so although he knows that the Supreme Court of the United States reversed my disbarment, he asks me only whether I was disbarred, and I respectfully submit it is unworthy of the great functions of a Senate investigating committee to do that.

Senator McClellan. The Chair thinks you have a perfect right to make that explanation.

Mr. Sacher. I beg your pardon?

Senator McClellan. The Chair thinks you have a perfect right to make that explanation, sir.

Mr. Sacher. Thank you, Mr. Chairman. Thank you.

Senator McClellan. Proceed.

Mr. Sourwine. Did you, Mr. Sacher, ever attend a gathering of leaders of the Communist Party, U.S.A.?

Mr. Sacher. Well, I defended leaders of the Communist Party of the United States of America in United States against Dennis, and I imagine I must

have attended such meetings, certainly. That is what you do when you defend clients, Mr. Counsel. You meet with them occasionally.

Mr. Sourwine. Did you ever attend a gathering of leaders of the Communist Party who were not your clients?

Mr. Sacher. I am not aware of it.

Mr. Sourwine. Did you attend a birthday party of Alex Bittelman in January 1950?

Mr. Sacher. I do not remember.

Mr. Sourwine. Did you attend a birthday party for Alex Bittelman in January 1950 in the board room at the Communist headquarters on the ninth floor in New York?

Mr. Sacher. I don't remember. I should say to you, Mr. Counsel, that you are speaking of a period when the Dennis case was in full progress, and I cannot say whether I was in a building where a birthday party may or may not have been taking place at the time.

Mr. Sourwine. Did you attend a birthday party for Alex Bittleman at which Henry Winston proposed a toast, "Comrades, let's drink a toast to Alex"?

Mr. Sacher. I have no recollection of that.

Mr. Sourwine. Do you have any connection with the legal commission or law commission of the Communist Party?

Mr. Sacher. I do not know of any such organization so I cannot say anything about it.

Mr. Sourwine. Are you now or have you ever been a member of the Lawyers' Section of the Communist Party, U.S.A.? [Count 3]

Mr. Sacher. Mr. Chairman, I have declined before and I decline again—

Senator McClellan. You are ordered to answer the question.

Mr. Sacher. On the grounds that I have already stated so I need not take the time of the committee, and I reemphasize that there is nothing in the purposes of the committee or the Congress, which comprehends the validity, the pertinence, or the relevance of an inquiry to me concerning my political beliefs or affiliations. I respectfully decline to answer that question.

Senator McClellan. May I say to you I have great respect for the law profession. I have tried to practice a little law myself. But when we come to the security of our country, an organization that is dedicated obviously to subversive purposes as an objective, I think it becomes the duty of the Congress of the United States and also the duty of the executive branch of the Government to try to ferret these things out and expose them if they relate directly to the national security—associations, at some time, and the knowledge of them, may help the Congress or help other officials of the Government to preserve national security. For that reason the Chair thinks that the question is proper and directs you to answer it.

Mr. Sacher. Mr. Chairman, I respectfully say to that, without any desire to be immodest, I think that in the defense of those that have been charged under the Smith Act or under the Internal Security Act of 1950, I have acted in the best traditions of the profession by defending the rights of people to speak, to publish, to meet under the first amendment.

Senator McClellan. This question was not related to your defending anyone in court. The question was related to your being present or being a member of a group of lawyers, presumably, ostensibly from the question—I do not know what the answer is—dedicated to the Communist Party.

Mr. Sacher. Mr. Chairman, for 30 years I have

practiced law in the State of New York and elsewhere in the United States, and I think again, without being subject to the charge of being immodest, that I have done a yeoman's share of the work that had to be done on behalf of the working men and women of our country. And I feel that my life is a living testimonial to what I am and to what I have done for my country, and I respectfully submit that it is a late time of the day for me to have to appear before anybody, after 30 years of honorable practice, to testify to my loyalty to the democratic institutions of the United States, and I unswervingly and unhesitatingly tell you my devotion is to the best interests of my country. And I believe I am serving those interests when I refuse to bend the knee to an inquiry concerning my innermost thoughts and beliefs, whether they be on politics, religion or anything else. My conscience dictates to me that I shall not, under compulsion answer today any more than John Freeborn Lilliburne answered in the 1640's to the Court of Star Chamber and on the same grounds, Mr. Chairman, on the grounds that it is incompatible with the dignity of the individuals to make compulsory disclosure of his thoughts and his ideas and his beliefs, I must respectfully decline to answer that question.

Senator McClellan. You have a right to decline, of course, if you wish to invoke your constitutional privilege

Mr. Sacher. I am invoking my rights as a man and my dignity as a man and I am not invoking any privileges against self incrimination. I have never done anything and I pledge you, Mr. Chairman, I shall never do anything which, so far as I can help, will expose me to any criminal charges.

And I say to you that I speak not from fear of incrimination or prosecution. I speak only from the

dictates of conscience. And I ask all Americans to join me in resisting inquiries of this kind, for when the day comes when Americans will resist inquiries of this kind, we shall once again witness a restoration of those liberties which we so long enjoyed prior to the advent of the suppression of them.

Senator McClellan. Now you have made your speech. You are ordered to answer the question.

Mr. Sacher. I respectfully decline, Mr. Chairman.

Senator McClellan. All right, proceed, Mr. Counsel.

Mr. Sourwine. Mr. Chairman, may I ask that the witness be ordered to answer that question?

Senator McClellan. I ordered the witness to answer the question. He declined. The record so shows. Proceed.

It will be noted that petitioner declined to make the disclosures involved here solely on the grounds that they were not pertinent and that they invaded an area protected by the First Amendment. Most important is the fact that petitioner declined to make these disclosures only after it was made clear to him that the purpose of the interrogation into his political views and associations was solely and exclusively to aid the consideration of legislation barring Communists from the practice of law in the Federal courts (R. 50). No attempt was made to justify the pertinence of the questions to the announced subject under inquiry. In fact, petitioner's objection to the new line of questioning* was met not by a claim that it was linked to the Matusow recantation but that it was germane to a subject matter entirely different from that then under inquiry.**

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* We refer to the series of questions beginning with (R. 50), "Mr. Sacher, have you ever served a prison sentence?"

** Indeed, the questions here in issue were specifically asked in response to the direction of the chairman to "lay a foundation" for an exploration of this newly-advanced subject matter dealing with political qualifications for practicing law in the Federal courts.

2. The proceedings below.

Petitioner was indicted on a three-count indictment for refusal to answer the following three questions put to him by the subcommittee: (1) "Are you, Mr. Sacher, a member of the Communist Party, U.S.A.?"; (2) "Have you ever been a member of the Communist Party of the United States?"; (3) "Are you now or have you ever been a member of the Lawyers' Section of the Communist Party, U.S.A.?" (R. 2-3).

Prior to the opening of the trial, petitioner moved to dismiss the indictment on the broad ground that it failed to allege an offense against the United States (R. 3). Petitioner also moved for a bill of particulars (R. 4) setting forth the matter under inquiry as to which each of the three questions was allegedly pertinent, the manner in which each of the questions was claimed to be pertinent to such matter under inquiry and the legislative purpose of the matter under inquiry. Further, a motion was filed, accompanied by an offer of proof, challenging the qualifications of government employees to sit on the grand jury and requesting a hearing to establish the bias of such grand jurors (R. 4-9). The motions were denied (R. 9).

At the trial, the sole witness presented by the government to establish the pertinency of the questions to the subcommittee's inquiry was Mr. Sourwine, counsel for the subcommittee. Asked to identify the subject under inquiry at the time that petitioner was called, he stated (R. 11), "The committee was engaged in its continuing investigation into the scope, the extent, and the effect of subversive activity in the United States".* In support of the thesis

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* The equating of the subject matter of the committee's investigation with its general jurisdiction as set forth in clause three of its basic resolution is further seen by the witness' testimony (R. 12):

"The committee had testimony in its record dating back from 1952 with respect to activity of Mr. Sacher bearing on the subject of the committee's inquiry, that is, subversive activity."

that the questions involved here were rendered pertinent by the subcommittee's continuing at-large investigation into "subversive activity," this witness testified that the subcommittee hoped to secure testimony from petitioner concerning his alleged subversive activity in the following areas:

The subcommittee had information that a record containing a cross-examination by petitioner of Louis Budenz, a Government informer, had come into the possession of the attorneys for Owen Lattimore (R. 13, 15, 24). An attorney named Fanelli had testified before the subcommittee in 1952 that he had supplied this document to counsel for Mr. Lattimore. Mr. Sourwine testified that the subcommittee sought to learn whether (R. 24) "Mr. Fanelli's version of how Mr. Lattimore got the document * * * or whether the belief of the committee that it had been given by Mr. Sacher" was true. This, according to the testimony, was a most pressing reason for calling petitioner. Yet he was asked nothing at all about this matter.*

The second matter about which the subcommittee purportedly wanted to ask petitioner was his alleged presence at a birthday party for one Alexander Bittelman at which high functionaries of the Communist Party were said to have been present (R. 25).** A third subject which allegedly gave pertinency to the questions which petitioner de-

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* This matter was probed by the subcommittee at some length in its hearings on the Institute of Pacific Relations in 1952, but petitioner was not subpoenaed in connection with those hearings (R. 64).

** Petitioner was asked at the hearing about his presence at this affair and responded that he had no recollection of it (R. 54-55).

clined to answer was his claimed connection with a number of organizations.*

Curiously enough, petitioner was not questioned concerning his relationships to these organizations, nor was he asked about a fourth accusation, namely, that he participated as a pallbearer at the funeral of one Joseph Brodsky, who assertedly was "a well known Communist" (R. 28).

The remainder of Mr. Sourwine's testimony (R. 29-40) deals with information allegedly in the subcommittee's files concerning the Matusow recantation. According to this testimony, the subcommittee had established, prior to calling petitioner, that a plan for obtaining a recanting affidavit from Matusow had been conceived by two other lawyers (R. 30; G.E. 12, R. 94), who were counsel in another case in which Matusow had testified, *Jencks* v. *United States*, 226 F. 2d 553 (C. A. 5), reversed 353 U. S. 657. Mr. Sourwine testified that the subcommittee had established that as a means of obtaining an affidavit from Matusow in the *Jencks* case (R. 30), the two attorneys decided to get him to write a book which would be financed by a labor organization. The subcommittee assertedly was pursuing the hypothesis that the compensation for the book was a way of paying for the affidavit (R. 34). But it had no information that petitioner was involved in the transfer of funds to Matusow and indeed knew that he had no

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* Those enumerated by Mr. Sourwine included the following (R. 25-28): American League for Peace and Democracy, International Labor Defense, Civil Rights Congress, Jefferson School of Social Science, Lawyers Committee on American Relations with Spain, National Council of Arts, Sciences and Professions, National Lawyers Guild, School for Democracy, Workers School, Painters Committee for the Defense of Louis Weinstock, and the Connecticut Committee to Aid the Victims of the Smith Act.

part in the payment for Matusow's book (R. 34-35). Although the subcommittee concededly knew that petitioner had nothing to do with the book or its financing, Mr. Sourwine testified that the subcommittee nevertheless was interested in what petitioner knew about "the whole scheme" and to what extent he "participated in the planning for the strategy of it" (R. 35).

The suspicion, inspired by the manner in which the testimony was elicited,* that the justification for the pertinence of the question was an afterthought is well-grounded in the simple circumstance that petitioner was not asked a single question at the hearing either about the book or about its financing.

In the same way, when first asked what information the subcommittee possessed concerning petitioner's connection with an alleged conspiracy to discredit Government witnesses and to secure new trials for convicted Communists, Mr. Sourwine replied (R. 31), "The only connection that the committee had information of in its files at that time was that Mr. Sacher had received the affidavit and certain other papers from Mr. Matusow" for use in seeking a new trial in the *Flynn* case.

Again it apparently became necessary to qualify this unequivocal answer. Pressed further about the connection of petitioner to Matusow's recantation, Mr. Sourwine testified (R. 33, 36) that the subcommittee had information that the Matusow recantation and the writing of the book, as well as the "whole drive" to discredit government wit-

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* Mr. Sourwine originally stated (*supra*) that the subcommittee knew that petitioner had nothing at all to do with the financing of the book. The "scheme" or "plot" theory was advanced when the witness was pressed (R. 35) to qualify his original unequivocal answers.

nesses, including "the coining of the phrase 'informer'," were all planned by a group of lawyers in the Communist Party, of which petitioner was one.

But, as we have seen, the pertinency of the questions here in issue was justified at the hearing on a wholly different basis,* namely, on the basis of proposed legislative restrictions upon the practice by Communist lawyers in the Federal courts (R. 37-38).

The case was tried before Judge HOLTZOFF without a jury. The trial court found petitioner guilty on all three counts (R. 10; 139 F. Supp. 855) and sentenced him to imprisonment for six months and a $1,000 fine (R. 10). The lower court affirmed. In contrast to the trial court which had justified the pertinency of the questions on the ground that they fell within the subcommittee's general jurisdic-

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* In addition to the fact that the "conspiracy" theory was not mentioned at the hearing and that the testimony about it at the trial was vague and contradictory, the report of the subcommittee (G. E. 12), which covers some 110 pages and contains detailed findings on the recantation, does not connect petitioner with Matusow aside from his participation as counsel in the *Flynn* case. Nor is this pertinency rationale fortified by Mr. Sourwine's testimony at the trial concerning the information in the possession of the subcommittee on the alleged conspiracy. The following is all the evidence in the record dealing with the existence of this "conspiracy":

The subcommittee assertedly had information that petitioner occupied offices in the same suite as the author of an article which appeared in *The Nation*, attacking the credibility of informers (R. 34); that in 1947 petitioner had attended a meeting at the home of one of the publishers of the Matusow book which was also attended by a Communist section leader (R. 36); that the affidavit had been notarized by an attorney who had been associated with petitioner in the *Flynn* case and typed by that attorney's wife after having been dictated in substantial part by another attorney who was also a lawyer in the *Flynn* case (R. 37).

tion (139 F. Supp. at 859-860), the court below found that the "conspiracy" theory brought these questions within the announced subject matter of the inquiry (240 F. 2d at 53). Beyond stating that there was no "abandonment" of the Matusow inquiry by the references to standards governing Federal law practice, it wholly failed to deal with the contention that this was the exclusive justification advanced to petitioner when he challenged the pertinency of the questions in issue. This ruling made it unnecessary for the court to reach our contention that there was no power in the subcommittee to initiate an inquiry into a new and unrelated subject matter. The court also upheld the validity of the indictment and of the subcommittee's basic resolution.

A petition to review the decision below was granted by the Court "and the case was remanded for consideration in light of *Watkins* v. *United States*, 354 U. S. 178." 354 U. S. 930.

The court below, sitting *en banc*, reaffirmed petitioner's conviction, four judges dissenting (Appendix B). One dissent was written by Judge FAHY on behalf of himself, Chief Judge EDGERTON and Judge BAZELON. A separate dissent was filed by Judge WASHINGTON, one of the members of the three-judge panel which had originally affirmed the conviction.

Reasons for Granting the Writ

I. Neither the Senate Resolution under which the inquiry was conducted, nor the statements of the subcommittee Chairman, made the pertinence of the questions sufficiently clear to meet the requirements of the due process clause.

Petitioner's conviction was improper because the pertinency of the questions to the matter under inquiry was not communicated to him with the explicitness and clarity required by the due process clause of the Constitution. *Watkins* v. *United States*, 354 U. S. 208, at 209. Intervention is required by this Court not merely because its express mandate to consider this case in the light of *Watkins* (354 U. S. 930) was ignored. By reducing the requirement of "indisputable clarity" in the communication of the reasons for pertinence to an empty verbalism and by continuing, as in the past, to disregard the special demands for precision made by restraints upon First Amendment rights, the court below has created a grave impasse in the administration of the contempt statute. Compare *Barenblatt* v. *United States*, No. 787 this Term. Unless this *en banc* decision of the court, which of all the courts in the country is most frequently called upon to review contempt of Congress cases, is reversed the constitutional rights of witnesses before Congressional committees will be lost.*

A. *Resolution 366*

In *Watkins* v. *United States, supra*, the Court, in construing House Resolution 5 creating the House Un-Ameri-

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* In some nine cases, under Title 2, U.S.C., Section 192, now pending in the court below, motions to defer further proceedings pending the disposition of this case and *Barenblatt* v. *United States, supra*, were denied on February 14, 1958.

can Activities Committee, found that the boundless scope of the resolution made it easy for the committee to engage in investigations totally beyond its legislative jurisdiction and difficult for witnesses to resist compulsory disclosures outside the legislative sphere. This fundamental defect in the resolution in turn made it impossible for the committee internally to confine its inquiries to legislative subjects and burdensome for the witness to ascertain whether a particular question is or is not "pertinent to the matter under inquiry." 2 U.S.C. 192; 354 U. S. at 206-209.

The latter problem of statutory jurisdiction, the Court pointed out, has constitutional dimension. Since pertinency to the matter under inquiry is "part of the standard of criminality" under Section 192, the due process clause of the Constitution requires that it be free of "the vice of vagueness."

The court below, in order to save the resolution involved here from the same condemnation which the Court in the *Watkins* case directed against the resolution creating the House Committee on Un-American Activities, found that the Matusow investigation was conducted under clause 1 and clause 2 of the Senate Resolution 366 (but presumably not clause 3). But the court ignored the fact that the investigation obviously had no relation to the administration, operation and enforcement of either the Internal Security Act of 1950 or any other law. Indeed, the court turned its back on the subcommittee statements which reflect its own conception of the portion of the resolution authorizing the inquiry. On no less than three occasions (R. 43, 52, 56) the subcommittee chairman equated its authority to conduct with the final catch-all clause of the resolution, "The extent, nature and effects of subversive activities in the United States." The government at the trial relied on the same vague clause (*supra*, pp. 19-20). The clauses upon which the court below relied were not

mentioned at all, either in the hearing or at the trial. Indeed, neither the trial judge nor the panel of the court below which decided this case prior to *Watkins* relied upon these clauses in upholding petitioner's conviction. In this Court, on petition for certiorari, the Solicitor General in his memorandum in opposition did not argue that these clauses were relevant.

In the light of all this, a claim that the resolution clarified the pertinency of the questions would be absurd. And it can hardly be disputed that clause 3 of the Resolution which is relevant here is subject to the very same defects as those which were emphasized by the Court in *Watkins*.*

B. *The statements at the hearing.*

As we have seen (*supra*, p. 8), at the commencement of the investigation on February 21, 1955, the chairman of the subcommittee stated that the inquiry would be limited to that subject and that when the hearings began on February 21, 1955, the scope of the investigation or the "question under inquiry" was confined by the Chairman of the subcommittee to the truth or falsity of testimony given by Harvey Matusow before the subcommittee and elsewhere, and the circumstances leading to Matusow's recantation of such testimony.

When petitioner protested the pertinency of the questions involved here, both on the ground of the First Amend-

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* A well-reasoned opinion by Judge YOUNGDAHL in *United States* v. *Peck*, 154 F. Supp. 603, concludes that none of the clauses of Senate Resolution 366 in any way redeems it from the vice of vagueness, and that the evils which flow from the application of House Resolution 5 are equally characteristic of the application of Senate Resolution 366.

ment, as well as lack of pertinency, the only explanations which he received dealt with a claimed concern of the subcommittee with the violent overthrow of the government (R. 52) and with "national security" (R. 55).

After the witness was questioned in detail about his relationship to Matusow and answered all questions put to him concerning this subject, he was asked a new kind of question, namely, whether he had ever served a prison sentence. When the witness challenged the pertinence of this question, the Chairman, a skilled and experienced investigator, apparently shared petitioner's doubt as to pertinence (R. 50): "The chair will hear counsel. I was not just certain what the purpose of it was." Petitioner was then informed by the committee counsel that these questions were germane to a measure under consideration by the subcommittee barring Communists from practice in the Federal courts (R. 50-51). The Chairman instructed committee counsel that the proper way to "lay a foundation" for an interrogation into the new subject of the qualifications of Communist lawyers was not by initially asking the witness whether he had ever served a prison sentence, but "first by asking the witness if he is a member of the Communist Party, if he has ever been, and so forth" (R. 51). When the witness continued to protest the pertinency of these proposed questions on the ground that they were diversionary and a departure from the subject of Matusow, the subcommittee Chairman persisted in his instruction to counsel that he "ask the proper questions to lay a foundation for this" (R. 52).

In short, the subcommitte did not merely fail to enlighten the petitioner as to how the Matusow recantation justified the new line of questioning, but rather affirmatively told

him that an altogether different subject made the questions germane.*

C. *The decisional grounds below.*

The court below found (App. B) that the questions in issue were intended to be pertinent to the Matusow inquiry; that petitioner should have known that they were so intended, and that in fact he actually knew the reasons for the pertinency of the questions to the Matusow inquiry. The court apparently adopted the view that the questions which the witness refused to answer were so inherently linked to the subject under inquiry as to require no explanation upon an objection of non-pertinency. The court, however, nowhere explained why the content of these questions made their relationship to the Matusow inquiry "indisputably clear" to the witness. Moreover, its entire discussion of this question is marked by a curious failure to deal with the fact that the subcommittee chairman's only responses to the objections to pertinency failed, as we have seen (*supra*, p. 28), to link these questions to the subject of the Matusow investigation.**

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* In our original petition in No. 884, we argued at some length (pp. 37-40), that the two members of the subcommittee present at the time of petitioner's appearances did not possess the authority to change the subject matter under inquiry from Matusow's credibility to the qualifications of lawyers to practice. Neither the government nor the court below has ever challenged this contention, which is adequately summarized in Judge FAHY's dissent (App. B, p. 17, fn. 1). It follows, therefore, that the pertinency of the questions to this new unauthorized subject matter could not justify petitioner's conviction.

** Throughout its discussion of the issues, the court consistently ignored the statements of the subcommittee itself as to its grounds for proceedings. Although the court has no other occasions (e.g. *Watkins* v. *United States*, 233 F. 2d 681) stressed the great deference which courts must accord subcommittee statements of investigative purpose, in this case it preferred to disregard this caution and substitute its own judgment for the subcommittee's both as to why petitioner was required to answer the questions and as to the source of the delegated power to conduct the investigation see *supra*, p. 26.

But the court below could not similarly ignore the subcommittee's abandonment of the Matusow inquiry. So this barrier to conviction was removed by the thesis that the subject of qualifications for lawyers constituted a brief digression or excursion which was terminated prior to the interrogation of the witness about his Communist affiliations. The court found that, "as with almost any examination of a witness" * the entire interrogation of petitioner was bound together by a "main thread" (App. B, p. 6) from which there was a digression.

But this limited digression theory simply cannot be reconciled with the structure and content of the examination. Prior to the question whether the witness had ever served a prison sentence, the interrogation dealt specifically and exhaustively with his relationship to Matusow (R. 40-50). The question about a prison sentence marked a sharp cleavage in his interrogation and all the questions which followed dealt, as we have seen (*supra*, pp. 12-15), exclusively with the witness's personal background, his private life and his alleged Communist affiliations. Moreover, the theory of a one-question digression is defeated by the fact that long after the alleged termination of the claimed digression the witness was again asked whether he had ever served a prison sentence (*supra*, p. 14) and by the failure of the subcommittee to tell the witness upon objection that the questions were linked not to the qualifications of lawyers to practice but to the Matusow recantation.

Petitioner's protest against the first prison sentence question concludes (R. 51-52):

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* We had always thought that the most common characteristic of the examination of a witness is not that it hops back and forth from its main line, but rather that it exhausts one subject and then proceeds to another.

"Let there not be here made an attempt to prejudice the determination not only by Judge DIMOCK, but by the people of the United States as to whether or not Matusow lied when he testified at the Flynn trial. Now, I submit, Mr. Chairman, that this—if I may say so—that this is doing a disservice to the administration of justice."

The Chairman responded (*ibid.*);

"That is what we are trying to find out. Now let us proceed, Mr, Counsel, and ask the proper questions to lay the foundation for this."

The court below found that this colloquy "conclusively shows that as a result of objections from appellant, the digression or 'excursion' was promptly terminated * * *" (App. B, p. 7).

Apart from the fact that, as we have seen (*supra*, pp. 12-15), the record objectively shows a complete abandonment of the Matusow subject, the court's textual reading of the colloquy is tortured. By italicizing the spoken words "that" and "this", the court could hardly alter the rules of grammar, endow these pronouns with a demonstrative rather than an indefinite denotation and assign them the antecedent, "whether or not Matusow lied when he testified at the Flynn trial." * These words do not acquiesce in petitioner's objection but reject it by establishing continuity

* Besides, if these words were used demonstratively, it is arbitrary to relate them selectively to the antecedent phrase about Matusow's having lied at the Flynn trial and to overleap the last sentence about a "disservice to the administration of justice." This is especially true since the subject of the inquiry was not primarily whether Matusow had lied at the Flynn trial—but rather his recantation of his testimony before the subcommittee (*supra*, p. 8). The Chairman had expressly disavowed a purpose to retry the *Flynn* case (R. 47).

with the Chairman's previous instruction to counsel to "lay the foundation for that" *i.e.*, the subject of qualifications to practice. As Judge FAHY's dissent points out (App. B, p. 19), "it seems reasonably clear the Chairman at that point was not returning to the Matusow subject but was repeating in substance what he had said with regard to the digression from that subject," namely, that a foundation should be laid with respect to the subject of practice in the Federal courts, not Matusow.

Further, the intention to explore a new subject-matter is plain from the instruction to the subcommittee counsel to "ask the proper questions to lay the foundation for this." The Chairman originally thought that asking the witness whether he had ever served a prison sentence was not a proper way to launch an interrogation into the new subject of qualifications for lawyers. Before asking such a question counsel was instructed to ask "first about membership in the Communist Party." As soon as petitioner had completed his protest, counsel was not instructed to desist from pursuit of this alien subject but, again, to explore it in a more orderly way by asking "proper questions," *i. e.*, questions dealing with Communist Party affiliation. An instruction to ask "proper questions" was hardly necessary to continue an inquiry which, as the court below observed (App. B, p. 6) had already consumed eighteen transcript pages. And, for that matter what need would there have been for the laying of a foundation for further inquiry into a subject matter which the committee had already explored for eighteen pages?

The "conclusive" significance of the colloquy in issue as evidence of the continuity of the investigative purpose of the subcommittee has never before occurred to anyone in the course of this case. It was not relied on either by the government (R. 11-64) or the trial court (R. 64-74) at the trial of the case. The first decision below (240 F. 2d 46)

makes no reference to it. The government's memorandum in opposition in No. 884, likewise fails to refer to it either in its statement of facts* or in its argument.** And it was not even mentioned in the government's supplemental brief on remand before the court below. The short of the matter is that the court below has stood the record on its head in an effort to transform evidence which establishes an abandonment of the Matusow inquiry into its opposite.

The court below relied upon three contentions in addition to its "*this*" and "*that*" thesis. It urged (App. B, p. 14) that the questions in issue were pertinent because they were properly part of petitioner's cross-examination.

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* The government's memorandum in opposition thus summarized the record insofar as it relates to the question here in issue (pp. 10-11):

> "The chairman told counsel he 'should lay a foundation for that first by asking the witness if he is a member of the Communist Party' (R. 51). Following a protest by petitioner that such an inquiry into his 'political beliefs or associations' seems to him to be 'diversionary in character' (*ibid.*), he was nevertheless asked, and refused to answer, whether he then was or ever had been a member of the Communist Party (R. 52-53)—these being the questions on which counts 1 and 2 of the indictment are based (*supra*, p. 5). At that time he specifically disclaimed reliance on the Fifth Amendment.
>
> "The committee counsel thereupon once again asked petitioner whether he had 'ever served a prison sentence' (R. 53), petitioner replying on this occasion that he had—a sentence for contempt of court (*ibid.*)."

** The government argued (Opp. p. 15) that the "committee's digression certainly ended when petitioner was asked for the second time (and he this time answered) the question whether he had ever served a prison sentence." But this effort to save the count-three question which was asked after the second question about a prison sentence is plainly unsupportable. And *Watkins* would in any event invalidate this contention, for it is simply impossible to argue that the pertinency of the question was made undisputably clear to petitioner.

The court relied upon a statement early in the hearings by the Chairman that the witness was subject to cross-examination. But as the dissenting opinion points out (App. B, pp. 22, fn. 13), this statement "preceded the digression with respect to practice in federal courts and did not prevent that digression from occurring". The court further insisted (App. B, pp. 14-15) that the witness would not have answered the questions even if he had been told by the subcommittee why they were germane to the Matusow investigation. But we do not understand the law to be that the right to due process in a criminal case turns upon an appellate court's speculations as to whether a defendant would have been helped by affording it to him.

Finally, the court wholly abandoned the record to speculate that petitioner's experience as a lawyer supports the reasonableness of charging him with an awareness of the pertinency of the questions to the Matusow inquiry (App. B, p. 14). We hardly think that due process of law turns upon such essentially treacherous forms of proof as a defendant's imputed occupational or professional experience. In any event, it seems to us that the contrary of the court's inference is more reasonable. An experienced lawyer could be expected to know only that when a committee chairman changes the subject matter of an inquiry, the witness has a right to rely upon his statement to that effect; that after a hearing has been conducted for a considerable period of time, it is unnecessary to lay a foundation for its continuance; that the purpose of objections to the pertinency of a question is to obtain an explanation linking it to the subject matter under inquiry and that when the committee Chairman offers an explanation which supplies no such link, it is safe to assume that no such link is intended, and that an interrogator is not required to lay a foundation for initiating the cross-examination of a witness.

It was the vagueness of the standard of pertinence which condemned the conviction in the *Watkins* case. Here vague-

ness is dwarfed by confusion. For the subcommittee told the witness that it intended that a subject other than the only one which can sustain petitioner's conviction was a justification for pertinence. The decision below thus transforms the congressional hearing into a contempt trap in which the witness may be ambushed, not merely because he is forced to grope in the dark, but because he is naive enough in making his responses to rely upon what he is told about the subject under inquiry.

D. *Pertinency could not be established at the trial by testimony concerning matters not disclosed to the witness at the hearing.*

Despite the fact that the basic resolution creating the subcommittee is inadequate to endow the questions involved here with pertinency under the statute, the government and the trial court relied upon it for this purpose. The government introduced at the trial a variety of matters which, it was claimed, showed that the witness had engaged in "subversive activity" (R. 70-72; 139 F. Supp. at 860). Obviously, the government could not belatedly make a suspicion that petitioner was "subversive" the justification for calling him and asking the *ad hoc* questions involved here, in the face of the explicit statement to the witness at the hearing concerning the reasons why he was asked these questions.* And it was a denial of petitioner's right to

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* A trial of petitioner's past life and political associations was the government's only alternative after it had disregarded the reasons for the interrogation communicated at the hearing. The "subversive activity" theory which was used to justify pertinency at the trial, suggests that the prosecution felt it necessary to begin all over again on a new theory because pertinency could not be justified upon the basis of the record of the hearing itself. This suspicion is fortified by the fact that the subcommittee did not, with a single exception (R. 25, 54-55), address any questions to petitioner at the hearing concerning the sundry matters which Mr. Sourwine testified were of interest to the subcommittee and constituted a reason for calling him.

due process for the trial judge not only to admit this evidence but to find pertinency on the basis of it (*supra*, pp. 19-23).*

II. Senate Resolution 366 did not authorize the Internal Security Subcommittee to require answers to questions such as those put to petitioner.

It is hardly open to question that interrogation of the kind involved here threatens First Amendment rights. *Watkins* v. *United States, supra; Sweezy* v. *New Hampshire*, 354 U. S. 234, 350; *Koenigsberg* v. *State Bar Association of California*, 353 U. S. 252, 261; *American Communications Assn.* v. *Douds*, 339 U. S. 382, 392. The Court recognized unequivocally in *Watkins* that the compulsory disclosures involved there impair the freedom of the witness, of those he is forced to identify and of large groups who, though not direct victims of legislative abuse, are intimidated into silence. The problems for the Congress, the committee, the witness and the courts which result from the illimitable scope of the resolution, the looseness of its delegation, the absence of clear legislative justification as a foundation for jurisdictional pertinency and as a control over statutory pertinency, all were rendered insuperable, the Court ruled, primarily because of the special claims of the protected freedoms.

The Court ruled in *Watkins* that "when First Amendment rights are threatened, the delegation of power to the

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* The injury to petitioner was compounded by the trial court's denial of a motion for a bill particularizing the matter under inquiry and the reasons for the pertinency of the questions (R. 4). The motion was denied on the ground that the material sought was available in the printed record of the hearing (R. 79-80). The court then justified the pertinency of the conviction on the basis not of the hearings but of matters undisclosed to the witness and recited at the trial by the subcommittee counsel.

committee must be clearly revealed in its charter." 354 U. S. at 208-209, 217.* As we have already shown, the portion of the Resolution which is invoked by the indictment in this case shares all of the vagueness of House Resolution 5. The unparticularized language of the Resolution must, therefore, be construed so as to exclude the authority to compel compulsory disclosures of the kind involved here. See *United States* v. *Rumely*, 345 U. S. 41, 45-47.

III. If Senate Resolution 366 is authorized to require answers to questions such as those put to petitioner, it is unconstitutional.

In *United States* v. *Peck, supra,* the court found that Resolution 366 when construed to authorize compulsory disclosures of the sort involved here, violates basic freedoms. The court thus stated, *supra,* at 609:

> "In its resolution, the Senate did not undertake the troublesome task of defining 'subversive activities'. The Senate did explicitly state, however, that the investigation was not limited to 'movement(s) seeking to overthrow the Government of the United States by force and violence.' But no indication is given as to what else is deemed 'subversive', nor is the Court aware of a satisfactory definition. What may be a fit subject of investigation one day may be tomorrow's sacred cow. What is the height of orthodoxy today

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* As Judge WASHINGTON pointed out in his dissenting opinion (App. B, p. 23):

> "I think one of the main thrusts of *Watkins* was this: that the courts should not sanction the criminal conviction of a person who refuses to answer questions which would touch upon First Amendment rights * * *, unless there is shown clear legislative authority, within the framework of the constitutional responsibilities of the Congress."

may be viewed as 'un-American' tomorrow. Nor is there any individual who can be certain that he is not considered 'subversive' by some of his fellow citizens. Who is to say, for example, whether one who is openly dedicated to depriving his neighbors of their 14th Amendment rights under the Federal Constitution is a 'subversive'? The dangers of classifying certain forms of belief or political activities as 'subversive' are all too apparent from the recent history of this country. It is too easy for one segment of public opinion to smear with that label those who hold opinions which are unpopular. Such labeling by means of legislative investigations constitutes a drastic form of Governmental sanction. When that labeling is done in the manner utilized by the Senate Internal Security Subcommittee it becomes intolerable. Democracy deals unpopular views by offering better ideas and programs, not by outlawing those views or penalizing their adherents.

* * *

"* * * A comparison of the Subcommittee's reports with those of the Un-American Activities Committee demonstrates an identity of understanding as to the sweeping mission to be accomplished. Each conceived of itself as the nation's watchdog. Each thought that it was capable of determining what was 'Un-American', what was 'subversive'. Each failed to distinguish between innocent associations with groups which were legitimate at the time of membership and knowing adherence to a criminal conspiracy."

In *United States* v. *Rumely, supra,* the court pointed out that where First Amendment rights are involved, the courts will "construe narrowly the resolution describing the committee's authority." Only an interpretation of the Resolu-

tion which would exclude the power to ask the questions here in issue could avoid a serious constitutional conflict.

IV. The subcommittee was not authorized by the full committee to conduct the inquiry or to require answers to the questions in issue.

In *Watkins,* it was at least clear that the whole range of Committee power was delegated to the subcommittee. Here there is nothing in the record to show the nature and scope of the delegation to the subcommittee. All that appears (R. 82-83) is that at some time prior to 1955 there had been some sort of delegation, but its nature and scope are completely obscure. The government thus has totally failed to sustain its burden of proving the authority in the subcommittee to conduct the inquiry here in issue.

V. The insufficiency of the indictment.

The indictment (R. 2-3), alleges that petitioner had "unlawfully refused" to answer the questions put to him. It contains no allegation that these refusals were wilful or deliberate or intentional. Moreover, it contains nothing more than a reference to the legislative authority for the subcommittee's hearing and a naked allegation that certain questions put to petitioner were pertinent to an unspecified "question then under inquiry". The indictment is accordingly insufficient and should have been dismissed because it fails to allege and specify (a) that the "question then under inquiry" was within the scope of authority delegated to the committee by Congress and to the subcommittee by the committee; (b) the nature of the "question then under inquiry" to which questions put to petitioner are said to have been pertinent; and (c) that the refusal to answer was deliberate or intentional.

Indictments substantially identical to that involved here have been dismissed by the Court of Appeals for

the Second Circuit for failure to specify the above three essential elements of the offense. *United States* v. *Lamont*, 236 F. 2d 312 (C. A. 2).* There is thus raised a conflict in the circuits with respect to an important question in the administration of Section 192, which apart from all other considerations warrants review here. Since the decision in *Lamont*, the government has brought indictments under Section 192 in three cases in the Second Circuit. These indictments, involving the Committee on Un-American Activities, contain specific allegations with respect to the source of authority for the particular investigation, the nature of the matter under inquiry, and the fact that the defendant "deliberately and intentionally" refused to answer.**

A. *The failure to allege that the question under inquiry was within the subcommittee's delegated authority.*

The opening paragraph of the indictment lists four sources of authority for the hearing held by the subcommittee. Two of these, however, must be discarded as irrelevant. Section 102 (1) (k) of the Legislative Reorganization Act of 1946 (P.L. 601, c. 753, 60 Stat. 818) merely prescribes the number of members of the Senate Committee on the Judiciary, and directs that all bills, resolutions, and other legislative matters relating to eighteen listed topics (e.g. "Judicial proceedings, civil and criminal, generally" and "civil liberties") shall be referred to the committee. Neither here nor in the Standing

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* The government has not sought review of the Court of Appeals decision affirming Judge WEINFELD's decision dismissing the indictments. 18 F.R.D. 27 (D. C. N. Y.).

** These cases are *United States* v. *Seeger*, No. C-152-240; *United States* v. *Yarus*, No. C-152-239, and *United States* v. *Sullivan*, No. C-152-238.

Rules of the Senate, wherein Rule XXV (k) simply duplicates Section 102 (1) (k),* is any authority delegated to the committee to conduct investigations, issue subpoenas, or exercise compulsory testimonial power.

There is, however, another provision of the Legislative Reorganization Act of 1946—Section 134(a), not mentioned in the indictment—which does authorize "each standing committee of the Senate, including any subcommittee" to conduct investigations, issue subpoenas, and require the attendance of witnesses and the production of documents. It is from this provision that the committee derives its compulsory testimonial authority, and it is Senate Resolutions 366 (81st Cong., 2d Sess.) and 58 (84th Cong., 1st Sess.), referred to in the indictment, and set out *supra,* p. — which prescribe the scope of that authority.

It is within the meaning of this language that the authority for the inquiry must be found. Conceivably, the matter under inquiry before ths subcommittee on April 19, 1955, might have been within the scope of that authority. But the indictment does not so allege. Nor does it allege any source of authority in the subcommittee to conduct any inquiry whatsoever. For these reasons, the indictment is fatally defective. On these very grounds, indictments that were identical in all relevant respects were dismissed in *United States* v. *Lamont, supra,* and *United States* v. *Metcalf, unreported* (Crim. No. 3052, S. D. Ohio W. D. 1955). In *Watkins* the Court was quite specific in its insistence that committees engaged in inquiries of the sort involved here must be "restricted to the missions delegated to them." 354 U. S. at 206. The

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* The Standing Rules are reproduced in *Senate Manual,* S. Doc. 9 (84th Cong., 1st sess.), and Rule XXV(k) appears at pp. 37-38 thereof.

requirement that the source of investigative authority be made explicit is not a causal or optional one, but rather essential to judicial determination that a legislative need was felt for the information denied by the witness to the committee. It should thus have been incorporated in the indictment for the guidance not only of the defendant but of the trial court.

B. *The failure to specify the matter under inquiry to which the questions put to petitioner are said to be pertinent.*

Unless the questions which petitioner declined to answer were pertinent to a matter which the subcommittee, duly authorized, was inquiring into at the time, he has committed no offense. The indictment charges that the questions were "pertinent", but it does not state to what matter they were pertinent. The allegation that the questions put to petitioner were pertinent "to the question then under inquiry", without any description of the latter, is meaningless, and fails to satisfy the well-recognized requirement that an indictment under 2 U.S.C. 192 must plead pertinency as an essential element of the offense. *Sinclair* v. *United States*, 279 U. S. 263.

The Court in *Watkins* ruled that the elucidation of pertinency to the witness at the hearing is an indispensable due process requirement. We think the same reasoning applies to an indictment under the contempt statute. Indeed, the manner in which the government and the court have played "hide-and-go-seek" with the matter under inquiry in this case strongly suggests that the government has resorted to a vague and loosely drawn accusation because a properly-drawn indictment would at once disclose that the questions

put to petitioner were not pertinent to the matter then under inquiry.*

C. *The failure to allege that petitioner acted wilfully.*

In the *Lamont* case, District Judge WEINFELD held (18 F. R. D. 27) that the indictments involved there were fatally defective for failure to allege that the refusals were "deliberate" or wilful. The decisions of this Court, upon which Judge WEINFELD relied, in *Quinn,* 349 U. S. 155, and in *Bart,* 349 U. S. 219, seem to us to dispose of this matter. In *Quinn* the Court held (at 165) that, "Section 192, like the ordinary federal criminal statute, requires a criminal intent—in this instance, a deliberate, intention refusal to answer." The Court further ruled that, "This element of the offense, like any other, must be proved beyond a reasonable doubt."

If a deliberate, intentional refusal is an element of the offense which must be proven, it must also be alleged in the indictment. *United States* v. *Hess,* 124 U. S. 483. Nor can it be claimed that the requirement of wilfulness is a formal or technical one. Compare *Morisette* v. *United States,* 342 U. S. 246.**

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* This case is a perfect illustration of the injury that results to a defendant when he is compelled to guess at the question "then under inquiry." The trial court and the lower court did not agree as to the nature of the matter under inquiry. Petitioner had to grope in the dark in order to comprehend what was relevant or important in the government's testimony about his "subversive" background. He was denied a bill of particulars on a theory which the court disregarded in ruling on pertinency. He assumed that clause three of the Senate Resolution was invoked by the indictment from the way in which the case was tried and he has now learned that the subcommittee was proceeding under clauses one and two alone!

** The necessity for an allegation of a deliberate or intentional refusal is related to the requirement that the indictment set forth the

(Continued on following page)

All of our contentions regarding the defects in the indictment frame a conflict between two theories with respect to the contempt statute. We insist that this is, after all, an "ordinary federal criminal statute" which must be applied in the light of the well-understood canons of the criminal law. But the application of the statute in this case can only be defended on the theory, denounced long ago by Jefferson in a discussion of congressional contempt powers, that "the offense is to be undefined, and to be declared only *ex re nata,* according to the passions of the moment * * *." *

VI. The denial of petitioner's right to a fair and impartial grand jury.

In the trial court, petitioner unsuccessfully moved for a hearing in order to determine the qualifications of the grand jurors which returned the indictment. The motion represented that eleven members of the indicting grand jury were employees of the United States Government and two were housewives who might be wives of government employees. A hearing was sought to determine whether the votes of government employees or wives of government employees were necessary to return the indictment and to establish the bias of these individuals (R. 4-9). The motion was accompanied by an offer of proof of a climate of opinion among government employees that they would jeopardize their tenure or provoke investigation by failing to

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(Continued from preceding page)

nature of the matter under inquiry. As Judge BAZELON observed in his concurrence in *Bowers* v. *United States,* 202 F. 2d 447, 453 (App. D. C.),

> "A conclusive presumption of intent to violate the statute *might* attach to a naked refusal to answer * * * no such presumption would attach to a refusal to answer a question not shown to be 'pertinent to the question under inquiry.'"

* *Jefferson's Manual* (Sen. Ed. 1892) 194.

indict petitioner at the Government's request.* We think that a hearing should have been granted and that the Court should resolve this recurrent problem.

CONCLUSION

The decision of the court below conflicts with the applicable decisions of this Court and raises important questions of Federal law requiring review by this Court. The reasons stated above, as well as the Court's responsibility for the protection of the integrity of the grand jury system, require that this petition for writ of certiorari be granted, the decision below reversed and the indictment dismissed.

Respectfully submitted,

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* Compare *Dennis* v. *United States*, 339 U. S. 162.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JANUARY TERM, 1958

Criminal 1216-55
FILED JAN 31 1958

No. 13,302

HARRY SACHER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Reargument of Appeal from the United States District Court for the District of Columbia Pursuant to Remand by the Supreme Court of the United States.

Before: Edgerton, Chief Judge, and Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges, sitting in banc.

Judgment

Pursuant to the judgment of the Supreme Court of the United States dated July 23, 1957, this case came on to be reheard before the Court in banc on the record from the United States District Court for the District of Columbia, and was reargued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment of the said District Court

appealed from in this case be, and it is hereby, affirmed.

Dated January 31, 1958.

Per Circuit Judge BURGER.

Separate dissenting opinion by Circuit Judge Fahy, with whom Chief Judge Edgerton and Circuit Judge Bazelon join.

Separate dissenting opinion by Circuit Judge Washington.

Appendix B
Decision Below

(Opposite) ☛

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13302

HARRY SACHER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

On reargument of appeal from the United States District Court for the District of Columbia pursuant to remand by the Supreme Court of the United States

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Decided January 31, 1958

Mr. Telford Taylor, with whom *Mr. David Rein* was on the brief, for appellant.

Mr. William Hitz, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, *Lewis Carroll*, *John D. Lane* and *Harold D. Rhynedance, Jr.*, Assistant United States Attorneys, were on the brief, for appellee.

Before EDGERTON, *Chief Judge*, and PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN and BURGER, *Circuit Judges*, sitting en banc.

BURGER, *Circuit Judge:* Appellant Harry Sacher was convicted in the District Court under a three count indictment which charged him with violation of 2 U.S.C. § 192

for having refused to answer three questions[1] of a subcommittee of a Senate Committee which questions were found to be pertinent to a subject then under inquiry.[2] Appellant was sentenced to six months imprisonment and $1000 fine. Thereafter this court affirmed the District Court[3] and while a petition for certiorari was pending in the Supreme Court, the case of *Watkins* v. *United States*[4] was decided. Shortly thereafter, the Supreme Court granted certiorari and remanded the instant case[5] for reconsideration in light of *Watkins* v. *United States*. This court then set the appeal for reargument before the court en banc, received additional briefs and heard arguments.

On remand appellant raises four issues which he contends are controlled by the *Watkins* case: (1) the indict-

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[1] Count 1: "Are you, Mr. Sacher, a member of the Communist Party, U.S.A.?"

Count 2: "Have you ever been a member of the Communist Party of the United States?"

Count 3: "Are you now or have you ever been a member of the Lawyers' Section of the Communist Party, U.S.A.?"

[2] The announced subject under inquiry was the Matusow recantation.

On several occasions after his defection from the Communist Party and prior to the time of Sacher's appearance, Harvey Matusow had appeared before the Internal Security Subcommittee and described Communist infiltration activities. Early in 1955 Matusow recanted his testimony and said he had "lied when he testified before the [Internal Security] subcommittee and on other occasions." Subsequently he executed adavits, one of which was used by Sacher in a motion for a new trial for the defendant Elizabeth Flynn, who was convicted under the Smith Act in a trial in which Matusow had been a witness against her.

[3] 99 U.S.App.D.C. 360, 240 F.2d 46 (1957).

[4] 354 U.S. 178.

[5] 354 U.S. 930.

ment failed to allege essential elements of the offense; (2) the inquiry infringed First Amendment rights of privacy; (3) the Senate Resolution 366, which established the subcommittee, is invalid; (4) it was not indisputably clear to appellant that the questions were pertinent to the subject matter of the inquiry.

I. *Sufficiency of Indictment.*

While conceding that the "*Watkins* case does not, of course, deal directly with the sufficiency of the indictment," appellant urges his indictment was constitutionally insufficient because it did not recite "the nature of the matter under inquiry and that the matter under inquiry was within the subcommittee's delegated authority." In our view nothing said or implied in the *Watkins* opinion suggests the Court intended to interpret Rule 7c, FED.R. CRIM.P., to require that an indictment under 2 U.S.C. § 192 recite details of the authority and scope of the inquiry. We see no reason to alter our earlier holding that the indictment is sufficient.[6]

II. *Infringement of First Amendment.*

Appellant urges that "even if pertinent," information as to membership in the Communist Party or the "Lawyers' Section" thereof, "was altogether too remote from the subject under inquiry [the Matusow recantation] to justify an invasion of his protected freedoms," under the First Amendment. The Supreme Court has indicated that where the exercise of the investigative powers of Congress comes into conflict with the rights to freedom of expression and (presumably) freedom of association, the need for clarity in the congressional Resolution becomes

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[6] This court previously considered the sufficiency of the indictment in connection with Sacher's now abandoned point that the indictment failed to recite his failure to answer was "willful." 99 U.S.App.D.C. 360, 367.

more acute. "The delegation of power to the committee must be clearly revealed in its charter." *United States* v. *Rumely*, 345 U.S. 41 (1953), cited in *Watkins*. The *Watkins* opinion also emphasizes that "not all such inquiries [which impinge on First Amendment freedoms] are barred" and that they are not invalid unless "unrelated to any legislative purpose." It is plain that the courts must find the presence of a valid purpose related to lawmaking to justify "compelled disclosure." Congress is not permitted to expose only to embarrass. We considered this contention carefully in our earlier opinion, saying, "It is difficult to imagine a clearer 'overriding public interest' than an inquiry into an alleged conspiracy to discredit the congressional and judicial processes by suborning witnesses and by procuring recantations of testimony upon which Congress and the courts have theretofore relied." 99 U.S.App.D.C. 360, 366. We hold that appellant's right to refuse to say whether he is a member of the Communist Party is not greater than the right of the Senate to inquire into the conspiracy just described and to know appellant's connection, if any, with Communist action groups provided the answer might shed light on the primary inquiry. Even if we were to assume that the right to engage in Communist Party activity is a right protected by the First Amendment, which of course we do not concede, that right, not being absolute, must yield to a superior public need, such as that presented here. Nothing in the *Watkins*[7] opinion suggests that our prior holding in this respect should not be adhered to.

III. *Validity of Senate Resolution 366.*

In a prosecution for contempt of Congress under 2 U.S.C. § 192, such as presented here, the resolution of

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[7] In the *Watkins* opinion the Court emphasized that the indictment questions related to *past* activities of *other* persons, not of the witness.

the parent body must show that there was a valid legislative purpose for the inquiry. Unless this is shown, the courts cannot determine whether the inquiry was pursuant to a valid legislative purpose and whether the inquiry was within the authority delegated by the parent body. The *Watkins* case dealt with a resolution criticized by the Supreme Court for its vagueness. We are dealing with a different resolution. Senate Resolution 366 so far as we rely on it provides as follows:

> "*Resolved,* That the Committee on the Judiciary, or any duly authorized subcommittee thereof, is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States . . . ."

Bare recital of this portion of the resolution discloses that it is not subject to the same criticism as was directed at the House Resolution under which Watkins was questioned. It sufficiently describes "the kind of investigation that the committee was directed to make." When appellant was before the subcommittee the Internal Security Act of 1950 was recent legislation; in many respects it was novel, and its enforcement, and that of related laws was of acute interest and concern to the Congress, the Executive Branch and the public. The enforcement or lack of enforcement could be studied in various ways, including checking the truth or falsity of reports of conspiracies to frustrate the law and its enforcement by suborning witnesses. Such inquiries are important in amending and improving laws. We are satisfied that the resolution was valid, that investigation into the Matusow recantation was authorized by the resolution, and that the Matusow inquiry was pursuant to the valid legislative purpose plainly revealed by the resolution.

IV. *The Pertinency of the Questions.*

The final argument urged by Sacher is three-pronged. First, he contends that the questions were not even *intended* to be pertinent to the Matusow inquiry, but were intended to be pertinent to an altogether different subject,[8] and so he cannot be held to have known the questions were pertinent to the Matusow inquiry. Second he urges that the questions were not *in fact* pertinent to the Matusow inquiry, and so he cannot be held to have known that they were pertinent. Finally, he argues that even assuming the questions were intended to be pertinent to the Matusow inquiry, and further assuming the questions were in fact pertinent to the Matusow inquiry, still, he was not aware of these two factors at the time the questions were put to him; he correctly points out that under the *Watkins* case, to sustain a conviction it must appear that pertinency was made clear to the witness.

Intended Subject Matter: Appellant's contention is that the questions were not even intended to be pertinent to the Matusow inquiry, but instead, were intended to be pertinent to an inquiry relating, as he describes it, to "a measure . . . barring Communists from practice in the Federal courts." The determination of this issue is essentially one of fact the resolution of which depends entirely upon the record in the case.

As with almost any examination of a witness whether in court or before a committee, we find in this record a main thread of examination which is readily followed, and also occasional digressions. One digression was made from that main thread. In the original transcript this main thread, which is the Matusow inquiry, runs for 18 pages before the Count 1 question was asked. During the course of those 18 pages the witness resisted various

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[8] *Viz.* the admission of Communists to practice in Federal Courts, which subject, he argues, was beyond the scope of the subcommittee's powers.

questions, raised the issue of pertinency and after exchanges with the Chairman, gave answers covering in general his contacts with Matusow and with Communist leaders. Appellant contends the Count 1 question was asked in the context of this digression.

Shortly before the Count 1 question, a single question digressed into the subject of possible legislation controlling admission of Communist Party members to practice in Federal courts. However, the record conclusively shows that as a result of objections from appellant, the digression or "excursion" was promptly terminated and the line of questions brought back to "whether Matusow lied when he testified." The colloquy between the Chairman and appellant indisputably informed appellant that the digression was not approved by the Chairman and that he directed his counsel to ask the Count 1 question in order to "lay the foundation *for this,*" (emphasis added) *i.e.*, the inquiry into "whether Matusow lied."[9] In this context the Count 1 question was asked. Shortly following, the Count 2 question was asked.

The questions following those covered by Counts 1 and 2 related generally to contacts with Communist Party leaders, attendance at gatherings where Communist Party

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[9] Appellant objected to the digression saying he had understood he was called to testify about Matusow's recantation and argued that he had demonstrated in the Federal Court that Matusow lied. In the course of his statement he repeated three times that "Matusow lied" concluding:

> "Let there not be made here an attempt to prejudice the determination not only by Judge Dimock, but by the people of the United States *as to whether or not Matusow lied when he testified* at the Flynn trial. . . this is doing a disservice to the administration of justice.
>
> "Senator McClellan. *That* is what we are trying to find out. Now let us proceed, Mr. Counsel, and ask the proper questions to lay the foundation *for this.*
>
> "Mr. Sourwine. Are you, Mr. Sacher, a member of the Communist Party, U.S.A.?" (Emphasis added.)

members were present, including such gatherings which appellant explained as professional conferences or meetings with clients he was defending and inquiries specifically about being with named Communist Party members or leaders. As to most of these questions appellant said he could not recall. In this context he was asked the Count 3 question.

As to each of the indictment questions, as well as others, appellant protested against the alleged lack of pertinence or relevance of any inquiry about "political beliefs." He repeatedly and emphatically equated inquiries about Communist Party membership to "political" beliefs and professional associations.[10] As to the Count 3 question the Chairman explained:

> "This question was not related to your defending anyone in court. The question was related to your being present or being a member of a group of lawyers, presumably, ostensibly from the question—I do not know what the answer is—dedicated to the Communist Party."

Thus the record shows, indisputably, that the Count 1 question was plainly related by the Chairman's statement to the announced subject matter, "whether Matusow lied" both in point of its timing and in relation to the colloquy which *immediately* preceded it. Similarly the succeeding questions were in that same context, and similarly after the brief "excursion." Consequently, we hold that the questions involved here were intended to elicit answers

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[10] We are unwilling to say that appellant's membership in the Communist Party, if he is a member, is "political" activity or a simple exercise of rights of association protected from Congressional inquiry in all circumstances. Indeed in the light of repeated pronouncements by all three branches of Government, we would not be free to do so even were we inclined, which we are not. Participation in the work of the Communist Party, U.S.A., is not a simple matter of flexing one's political ideas and beliefs.

which would throw light on the Matusow recantation inquiry; it was to the Matusow inquiry, and not to any other inquiry, that the questions were intended to be pertinent and to which they were in fact highly pertinent.

Pertinence in Fact: Appellant argues that Communist Party membership, even if shown, "could not conceivably have shed any light on the inquiry before the subcommittee." We do not concede this for a moment. It needs no discussion to see that it was pertinent to the Matusow inquiry to find out whether appellant had any connection with a Communist conspiracy to induce Matusow to recant.[11] Whether appellant was a Communist was logically one of a series of questions designed to disclose the nature of his connection, if any, with the conspiracy.

In a legislative inquiry we do not find the conventional pattern of direct examination followed by cross-examination. There are no pleadings which serve to narrow the inquiry toward proof of specific issues framed in advance. The prime purpose of questions must be to get information rather than prove previously asserted claims. The witness is given wide latitude in making a statement of his own framing. A necessary preliminary is to identify the witness, his residence, occupation, general background, etc., for the record so as to give meaning to his testimony for members of the full committee or the entire Congress, few of whom ever see the witnesses. Once the witness is so identified and qualified by these "background" questions, interrogation as to the main subject matter takes place, covering the central facts, events, etc. A third phase of questions may then become pertinent, which like the background questions are pertinent on their face. This third

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[11] We pointed out in our original opinion that when the subcommittee called Sacher it had (1) reports linking Sacher with the Communist Party, (2) reports linking the Communist Party with a conspiracy to bring about Matusow's recantation, (3) reports linking Sacher as one of the lawyers party to this conspiracy.

phase is the process of testing the reliability of the witness or his possible bias and prejudice.

The *Watkins* case dealt with questions falling in the second phase or the main subject matter. The indictment questions fall within the third phase having to do with "testing" of answers previously given. Certainly no one would seriously suggest that the subcommittee must explain why it wants a witness to identify himself with any more explicitness than that the questions are preliminary or for background. Questions concerning a possible bias or the reliability of a witness are also pertinent on their face and if any explanation is called for it need be in terms no more explicit than that they are to test bias or reliability, *i.e.*, are for cross-examination.

Appellant had announced his fixed position "that Matusow lied when he testified" in the Flynn case. In refusing to answer the Count 1 question he said that "an inquiry to me concerning this matter [Communist Party membership] is not pertinent to anything with which this committee is concerned, and is not relevant to any inquiry that may properly be made of me."

The Chairman was not bound to accept this statement, for he had already explained to appellant concerning his earlier objections: " . . . you are subject to cross-examination on" statements made to the committee.[12]

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[12] A key to appellant's state of mind with respect to pertinency is disclosed in his pre-*Watkins* brief (filed July 1956) in which he stated, "Once it had been established that appellant had no information to give the subcommittee on the question under inquiry before it, *i.e.*, the circumstances leading to Matusow's recantation, the appellant obviously should have been excused. In this context, the probing into appellant's *political beliefs and affiliations* had no conceivable relevance to the subject matter under inquiry.' (P. 23.)

At another point in appellant's pre-*Watkins* brief he said, "The scope of the investigation or the 'question under inquiry' was defined by the Chairman of the subcommittee, at

In his statement immediately before and immediately after the Count 1 question, appellant was referring to the Matusow inquiry. His objection took fundamental issue with the subcommittee's right to test his answers for possible bias by cross-examination as to connection with the alleged Communist conspiracy under study. Evaluation of appellant's entire testimony would be highly influenced by the fact that he was a Communist, if indeed he was, and the best evidence on this crucial matter was the first hand knowledge of the witness. If he was a member of a party or organization reported to have conspired to discredit disaffected former Communists who appeared as witnesses against the Communist Party, it would be vital for the Subcommittee to know that fact.

Nothing could be plainer than that one of the purposes of the indictment questions was to test the reliability of appellant's answers concerning his relationship to the Matusow recantation and his possible connection with a suspected conspiracy to discredit prosecution of Communist Party members. In view of this we have no doubt that the questions asked were *in fact* pertinent to the Matusow inquiry, and we so hold.

Appellant's Awareness of Intended Subject Matter and Pertinence: We reach last the heart of Sacher's case, which is the contention that even if the questions

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the opening of the investigation, as dealing with the truth or falsity of the testimony given by one Harvey Matusow.

. . . .

"* * * The questions put to the appellant which formed the subject matter of the indictment *must be tested for pertinency as against this* [*the Matusow*] *subject matter* as stated by the Chairman.

"Tested against this criterion the questions clearly were not pertinent since the answer to the questions could not conceivably have shed any light on the inquiry before the subcommittee . . . ." (Pp. 18, 19, 20; emphasis added in above excerpts.)

were asked with reference to the Matusow inquiry, he was not aware that they were pertinent to that inquiry. We have seen that the questions were intended to be pertinent to the Matusow inquiry, and were in fact pertinent thereto. But, under the *Watkins* case, it must also appear that Sacher was *aware* of these two elements at the time the questions were posed.

At the threshold we must resolve the question of how awareness is to be demonstrated. Must it be shown that the witness himself experienced cerebral processes which included consciousness of this element, *i.e.*, that he was indeed *actually* aware, or is it sufficient to show that a reasonable person in the same circumstances would have been so aware? The latter, of course, is the historic standard of proving criminal intent.

While not expressly so stating, we think the *Watkins* opinion contemplates that the demonstration of pertinency must be of such clarity that a reasonable person in the situation of the witness would have understood the connection between the question and the subject matter.[13] To interpret the *Watkins* opinion as establishing a purely subjective test would place the scope of legislative investigation largely, if not entirely, within the control of the witness. While a witness might, as we think this witness did, disclose his grasp of pertinency by his own responses, a witness who sat mute before a committee in the face of all explanations of "connective reasons" would place himself beyond the reach of compulsory process for all practical purposes. We do not think the *Watkins* opinion implied any such absurd result, sub silentio nullifying all power to compel testimony. Such a test would make a defendant in a contempt case the judge of his own guilt. Moreover it would remove control of legis-

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[13] *Cf.* 43 VA.L.REV. 803 (1957); 26 GEO.WASH.L.REV. 98 (1957).

lative investigations from the Congress and place control in the witnesses.

The test of pertinency rationally must, therefore, be an objective test in these terms: on the whole evidence can it be said, beyond reasonable doubt, that a reasonable man in the situation of the particular witness would have known the question asked was pertinent to the subject under inquiry? Pertinence in this sense means that the specific question posed contemplates an answer which will shed some light on the subject under inquiry.

With this test in mind, we turn to whether appellant knew or should have known that the subject matter to which the questions were intended to be pertinent was the Matusow inquiry, and that the questions were in fact pertinent to that inquiry and the manner in which they were pertinent.

The *Watkins* case application to this situation arises out of the following statement in that opinion:

> "*Unless* the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, upon objection of the witness on the grounds of pertinency, to state for the record the subject under inquiry *at that time* and the *manner* in which the propounded questions are pertinent thereto. To be meaningful, the explanation must describe what the topic under inquiry is and the connective reasoning whereby the precise questions asked relate to it." (Emphasis added.)

In other words, unless it is clear the witness knows, he is entitled to an explanation of what the subject matter is, and how the questions are pertinent.

We have already shown that the bar admission "excursion" was ended, and the thread of inquiry was back on the Matusow case, when the questions were posed. Appellant's first words after the Count 1 question were that he understood he was called to testify about the Matusow recantation and he was prepared to answer questions con-

cerning his participation in connection with that matter, but he simply was not going to discuss his "beliefs, religious, political, economic or social." Thus he demonstrated he knew the subject was the Matusow case, but claimed he did not think questions as to his possible Communist Party membership were pertinent to it. In so doing appellant showed he was taking the risks inherent in refusing to answer. Of course we are not foreclosed by appellant's statement that *he* could see no pertinency or relationship between Communist Party affiliation, if any, and the Matusow recantation. It is enough for our purpose that he *should* have seen the relationship and hence the pertinency.

In order to accept appellant's thesis, that he could not reasonably be held to be aware of pertinency, we must believe that an experienced lawyer could not understand that Communist Party membership would be important in judging the value of the testimony and the credibility of a witness called to testify about his part, if any, in an alleged Communist conspiracy to subvert justice.

In these circumstances we think the explanations, including the Chairman's statement, "You are subject to cross-examination . . . and that is what the committee is proceeding to do," would constitute a sufficient explanation even if addressed to a layman; addressed to a seasoned litigation lawyer of thirty years' experience, it was actually superfluous. Nevertheless it was given "for the record" and fully meets the criteria laid down by the *Watkins* case. If any witness could ever be in doubt about the pertinency of the instant questions to the inquiry into "whether Matusow lied when he testified" and whether there was a Communist conspiracy to discredit prosecution of Communist Party members, this appellant is not that man. By the very answers given and statements made in his testimony and which he formally argued in his briefs,

appellant demonstrated that no explanation could possibly have satisfied him or added to his knowledge.[14]

A witness may not frustrate the legitimate process of inquiry by shutting his mind to explanation any more than he could do so by stuffing his ears with cotton to prevent hearing the explanation. And where it is plain and clear that any reasonable man would grasp the pertinency of the question without explanation it would be sheer nonsense for courts to say that none the less someone must, as by playing a mechanically recorded message, parrot to the witness a recital of that which the evidence shows he knows.

We hold appellant's responses make manifest his *actual* awareness that the Matusow recantation was the subject matter to which the questions were related and that he was fully aware of the manner in which those specific questions were pertinent to that subject. Apart from appellant's actual state of mind, a witness so situ-

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[14] "I refuse categorically, Mr. Chairman, to discuss my beliefs, religious, political, economic, or social. I do not do so on the ground of the Fifth Amendment. I do so because it is inconsistent with the dignity of any man to be compelled to disclose his political, religious, economic, social, or any other views. And I respectfully submit that an inquiry to me concerning this matter is *not pertinent to anything* with which this committee is concerned, and is not relevant to any inquiry that may properly be made of me." (Emphasis added.)

Also "I shall not, under your compulsion or anybody else's compulsion, make any disclosure of any of my beliefs, political, religious, economic, or social, past or present, and I decline to answer your question."

We note that Sacher appears not to have meant entirely what he said, for a few sentences later he abandoned this ground and revealed his "political" views to the extent: "I will say to the Chair that I have never been a member of any organization *which I believed* to be a teacher or advocate of the forceable or violent overthrow of the Government of the United States." (Emphasis added.)

ated reasonably should have known and could not fail to have known that the subcommittee asked these questions intending to secure information bearing on the Matusow inquiry and bearing on his own reliability as a witness, and such witness should have understood that the questions were therefore pertinent to that subject.

The dissenting opinion argues that "[t]he courts should be slow, however, to hold that a person shall be 'compelled' over his objection publicly 'to be a witness against himself' by supplying *obviously* self-incriminating information, particularly when the area protected by the First Amendment is threatened . . . though he does not rest his objection on the Fifth."

The short and simple answer to this is that every witness who thinks any answer will or may incriminate him has an absolute protection in the Fifth Amendment. Unconsciously, perhaps, the dissent shrinks from "forcing" a witness to raise the Fifth Amendment because some people may draw dark inferences from its use. Over recent years the frequent employment of the Fifth Amendment has, in the minds of some, brought it into "disrepute." The Fifth Amendment plainly—and properly—was intended as a shield against self incrimination; the First Amendment was not. The use of the First Amendment to shield one from supplying "obviously incriminating information about himself" would be a perversion of the Constitution, needless so long as the Fifth Amendment stands. Should this perversion be sanctioned it would not be long before repeated use of the First as a haven from incrimination would "contaminate" that Amendment. Mere recital of these factors demonstrates the folly of trying to adjust constitutional interpretation to meet the shifting breezes of segments of public opinion and the prevailing modes of witnesses before legislative committees.

Appellant's conviction is

Affirmed.

FAHY, *Circuit Judge,* with whom EDGERTON, *Chief Judge,* and BAZELON, *Circuit Judge,* join, *dissenting:* The guidance now afforded by *Watkins* v. *United States,* 354 U.S. 178, was not available to the two-member subcommittee when it conducted the hearing out of which this case arose. In *Watkins* the Supreme Court held that upon objection by a witness because of the nonpertinency of a question the subject matter of the inquiry must appear "with indisputable clarity" else the investigative body must state for the record the subject then under inquiry and the manner in which the questions are pertinent thereto, with a description of the topic and the connective reasoning whereby the precise questions relate to it. *Watkins, supra* at 214-15. The subcommittee in the present case had authority to take sworn testimony only upon a subject which had been designated by the parent Subcommittee on Internal Security, namely, "Strategy and Tactics of World Communism: The Significance of the Matusow Case." Concededly it could not enlarge or change the subject of its inquiry.[1]

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[1] S. Res. 366, 81st Cong., 2d Sess., to which the Internal Security Subcommittee of the Senate Committee on the Judiciary owes its authority, provides,

> A majority of the members of the [Judiciary] committee, or duly authorized subcommittee thereof, shall constitute a quorum for the transaction of business, except that a lesser number to be fixed by the committee, or by such subcommittee, shall constitute a quorum for the purpose of administering oaths and taking sworn testimony.

96 Cong. Rec. 16872 (1950). See also S. Res. 180, 81st Cong., 2d Sess., 96 Cong. Rec. 1284 (1950); S. Rep. 1208, 82d Cong., 1st Sess. (1950). On February 7, 1955, nine Senators were appointed to the Subcommittee. (G. Ex. No. 9.) On April 20, 1955, the Subcommittee authorized the taking of sworn testimony by one member. (G. Ex. No. 6.)

When appellant appeared on April 19, 1955, only two

Appellant, though at times protesting, answered all questions until asked by subcommittee counsel whether he had ever served a prison sentence. He expressed doubt as to the legislative purpose of this question. Thereupon the Chairman inquired of subcommittee counsel. He responded in the presence of the witness that legislation for the purpose of fixing additional standards for the practice of law in federal courts was under consideration and that it was germane to consideration of such legislation to inquire into circumstances involving the practice of law in federal courts by Communists or by those who defend Communists. He said he believed the inquiries in the Matusow case have bearing upon "that legislative problem now pending before the committee."[2] This was a clear departure from the subject about which the subcommittee was authorized to take testimony. The Chairman said he thought counsel "should lay a foundation for that first by asking the witness if he is a member of the Communist Party, if he has ever been, and so forth."[3] The witness was then permitted to state his understanding that he was to be interrogated concerning the Matusow recantation, that this inquiry into his political beliefs and associations was diversionary, and that if the committee desired to know how judicial procedures

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members were present. Their authority under S. Res. 366 was limited to administering oaths and taking sworn testimony. They could not establish or change a subject under inquiry; that is "business" for the transaction of which there must be a majority of the Subcommittee present, as there was on February 21, 1955, when the subject under inquiry here involved was established. See *Hearings Before the Subcommittee on Internal Security of the Senate Committee of the Judiciary, "The Significance of the Matusow Case,"* 84th Cong., 1st Sess., pt. 1, at 1-3; pt. 10, at 827-40 (1955).

[2] *Hearings*, pt. 10, at 835 (1955).

[3] *Ibid.*

should be improved it should await Judge Dimock's judgment on what had transpired with respect to Matusow and the Flynn trial (in which appellant had been engaged), adding that this line of questioning was doing a disservice to the administration of justice. The Chairman then said, "That is what we are trying to find out. Now let us proceed, Mr. Counsel, and ask the proper questions to lay the foundation for this."[4]

The majority of the court, while characterizing "a single question" as having "digressed into the subject of possible legislation controlling admission of Communist Party members to practice in Federal courts,"[5] conclude that the main thread of inquiry persisted and that the Chairman, apparently by the statement last quoted, returned to the Matusow subject. Surely the witness would not have so understood with the indisputable clarity required by *Watkins*. On the contrary, it seems reasonably clear the Chairman at that point was not returning to the Matusow subject but was repeating in substance what he had said with regard to the digression from that subject, namely, "The Chair thinks you should lay a foundation for that first by asking the witness if he is a member of the Communist Party, if he has ever been, and so forth,"[6] the foundation referred to being with respect to the subject of practice in federal courts by Communists or those who defend them, not the Matusow case.

This view is consistent with the nature of the questions then asked the witness, a lawyer practicing in federal

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[4] *Id.* at 836.

[5] The Solicitor General, in his memorandum filed with the Supreme Court opposing certiorari, refers to the subject of practicing law as a "digression" from the Matusow matter. Brief in Opposition to Petition for Certiorari, pp. 14-16, Sacher v. United States, Supreme Court Docket No. 884, October 1956 Term.

[6] *Hearings*, pt. 10, p. 835.

courts: The first question was, "Are you, Mr. Sacher, a member of the Communist Party, USA?"[7] His refusal to answer this and the question which soon followed as to whether he had ever been a member of the Party, constitute the bases for the first and second counts of the indictment. The third count rests upon his refusal to answer the related question as to membership in the Lawyers' Section of the Communist Party, U.S.A., which he declined to answer on grounds previously stated as to the pertinency or relevancy of an inquiry concerning his political beliefs or affiliations. The Chairman answered this objection by pointing out to him the general duty, when it came to the security of our country, for the Congress to try to ferret out and expose these things as they relate directly to the national security, and "for that reason the Chair thinks that the question is proper and directs you to answer it."[8] This explanation bearing on pertinency did not have a tendency to advise the witness that the questions were pertinent, or that the subcommittee considered them pertinent, to the Matusow inquiry, the subject the subcommittee was authorized to pursue.

We do not examine the question of pertinency in the light of the full authority of the parent Internal Security Subcommittee itself under its own charter, S. Res. 366, n. 1 *supra;* for the prosecution before us requires pertinency to the single inquiry involving the Matusow case. As to this, it is no help to say that this court can itself now conclude from its own appraisal of the nature and implications of the Matusow case that the questions were pertinent to that subject of inquiry; for the witness at the time the questions were asked was "entitled to have knowledge of the subject to which the interrogation is

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[7] *Id.* at 836.

[8] *Id.* at 838.

deemed pertinent."[9] And the subject of the knowledge, of course, must be the authorized subject of inquiry.

Our approach to the case is with a consciousness that a First Amendment problem lies in the background, in which situation, as in *United States* v. *Rumely*, 345 U.S. 41, the courts will "construe narrowly the resolution describing the committee's authority."[10] Moreover, "when First Amendment rights are threatened, the delegation of power to the committee must be clearly revealed in its charter."[11] By the same reasoning pertinency of the questions to the revealed delegation of power must be clear to the witness when he is testifying. The required clarity is not supplied when pertinency is then explained to the witness in terms of a nondelegated subject of inquiry.

We have in mind also that our view of this case does not affect the authority of the Congress to obtain the information the subcommittee sought. It does not prevent Congress from ascertaining the facts from voluntary witnesses or other sources. The courts should be slow, however, to hold that a person shall be "compelled" over his objection publicly "to be a witness against himself" by supplying *obviously* self-incriminating information, particularly when the area protected by the First Amendment is threatened,[12] though he does not rest his objection on the Fifth. In many instances reference to the Fifth is necessary to indicate that the answers might tend to

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[9] *Watkins* v. *United States*, 354 U.S. at 208-09, and see concurring opinion of Mr. Justice Frankfurter, 354 U.S. at 217.

[10] *Id.* at 198.

[11] *Ibid.*

[12] That First Amendment rights were threatened by the questions is clear, *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250; *Koenigsberg* v. *State Bar*, 353 U.S. 252, 261; *Communications Ass'n* v. *Douds*, 339 U.S. 382, 393.

incriminate the witness. Individual values sought to be protected by the Bill of Rights should cause the courts not to coerce unnecessarily by the penalty of the criminal law answers which might publicly convict the witness of unfaithfulness to a standard of good citizenship held by all but a few of his fellow citizens. Unless some strong need requires that the information be obtained in this particular manner from the witness himself we think it should be secured by other means. Be that as it may, we think it follows from *Watkins* that unless such public self-condemnation is sought by the investigative body with respect to a legislative subject clearly within the scope of that body's authority, and unless this is made entirely clear to the witness, the witness may not be convicted of crime for refusing to respond. We cannot find on the record before the subcommittee that appellant should have known with the clarity required by *Watkins* that the questions were pertinent, and were asked as being pertinent, to the Matusow investigation. He could well have believed from their immediate context that they were asked as pertinent to the entirely different legislative purpose referred to by subcommittee counsel, namely, the practice in federal courts of Communists or persons defending Communists, a subject about which the two-member subcommittee conducting the hearing had not been authorized to take testimony.[13]

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[13] We have considered the views of the majority of this court that the questions were made pertinent by the Chairman's statement to the witness that he was "subject to cross-examination . . . and that is what the committee is proceeding to do." *Hearings*, pt. 10, p. 833. We do not give this statement the effect attributed to it by the majority; it preceded the digression with respect to practice in federal courts and did not prevent that digression from occurring. And as to Count 3, the Chairman's statement after the witness' refusal to answer, that the question was not related to the witness defending anyone in court but to his

WASHINGTON, *Circuit Judge, dissenting:* I think one of the main thrusts of *Watkins* was this: that the courts should not sanction the criminal conviction of a person who refuses to answer questions which touch upon First Amendment rights and which appear designed to produce "public self-condemnation," in Judge Fahy's phrase, unless there is shown clear legislative authority, within the framework of the constitutional responsibilities of the Congress. So viewed, I think this conviction cannot stand.

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being present or a member of a group of lawyers presumably dedicated to the Communist Party, does not suffice to eliminate the diversion when the course of the hearing is read and considered as a whole. When so read and considered, the Chairman's statement, while not implying criticism of the witness for defending a particular case in court, could reasonably have been thought by the witness to refer to the subject matter of the diversion rather than to the Matusow inquiry.